93-908

No. _____

In The

Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

Petitioner,

v.

MARCUS E. COLLINS AND THE GEORGIA DEPARTMENT OF REVENUE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

CARLTON M. HENSON
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Center
Suite 400
3495 Piedmont Road
Atlanta, GA 30305
(404) 239-0774

82 pp

QUESTIONS PRESENTED

1. Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity.

2. Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief.

PARTIES

The parties to this proceeding are the Petitioner, Charles J. Reich, and the Respondents, Marcus E. Collins, Sr. (Georgia Revenue Commissioner) and the Georgia Department of Revenue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Federal

State

NO.: ____

THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CHARLES J. REICH, PETITIONER, V.
MARCUS E. COLLINS and THE GEORGIA
DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for Writ of Certiorari to
the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Charles J. Reich hereby petitions this Court for a Writ of Certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The December 2, 1993 opinion of the Supreme Court of Georgia in *Reich v. Collins II*, Ga. S.Ct. No. S92A0621 ("*Reich II*") (Appendix A) is reported at ___ Ga. ___, ___ S.E.2d ___ (1993). *Reich v. Collins I* ("*Reich I*"), decided November 19, 1992 (Appendix D) and the order denying Motions for Reconsideration in Reich I are reported at 262 Ga. 625, 422 S.E.2d 846 (1992). This Court's decision (Appendix B) vacating and remanding *Reich I* is reported at 509 U.S. ___, 113 S.Ct. 1325 (1993). The decision of the trial court (Appendix E) is unpublished.

JURISDICTION

The decision of the Georgia Supreme Court was entered on December 2, 1993. This Petition is filed within the time allowed by law, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14, Section 1

. . .

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

O.C.G.A § 48-2-35(a)[1]

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

O.C.G.A. §§ 48-2-59, 50-3-13, 50-3-19, 50-3-20 are set forth in Appendix G.

---

[1]Full text of O.C.G.A § 48-2-35 is Appendix G.

STATEMENT

This is the second appearance of this case before this Court. Last term, this Court vacated Reich I and remanded for further consideration in light of *Harper v. Virginia Dept. of Treasury*, 509 U.S. ___, 113 S.Ct. 2510 (1993), *Reich v. Collins*, 509 U.S. ___, 113 S.Ct. 1325 (1993) (Appendix B).

On remand, the Georgia Supreme Court concluded that, "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." *Reich II*, slip op. p. 4 (Appendix A, p. 5). The Georgia court concluded that Petitioner was not entitled to refunds under due process, and that court implicitly held that Georgia's refund statute did not allow refunds.

Before its amendment in September 1989, former O.C.G.A. § 48-7-27 exempted from state income taxation retirement benefits paid to state retirees while offering no exemptions for federal retirement benefits. In March 1989, this Court held that a similar exemption scheme in Michigan was illegal under 4 U.S.C. § 111 and the doctrine of intergovernmental immunity. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989). Following *Davis*, state officials in Georgia advised retirees to file refund claims under O.C.G.A. § 48-2-35 by filing amended returns. Acting on this advice and the publicity surrounding *Davis*, almost 40,000 federal retirees, including Petitioner, filed refund claims. The refund statute was established

Georgia law, and it provided unqualified refunds within the three year limitation period of the statute.

The refund statute provided, however, that claimants had to wait a year from the filing a claim with the Revenue Department to file suit. Because of this and the state's announced position that taxes on retirement income for 1988 were still due and payable on April 17, 1989, three lawsuits were filed in Georgia seeking relief from the illegal and unconstitutional taxation. All three suits were dismissed, at least in part, because of the existence of O.C.G.A. § 48-2-35. In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), the plaintiff sought declaratory relief and equitable relief in the form of an escrow fund for the accumulation of taxes paid after *Davis*. The Georgia Supreme Court dismissed the action as moot in view of the legislature's September 1989 amendment of the offending statute. With regard to the escrow of taxes collected after *Davis*, the Georgia Supreme Court held that the refund statute provided an adequate remedy at law obviating the need for equitable relief. 259 Ga. at 583, 385 S.E.2d at 75, n. 1.

Another group of retirees filed suit in U.S. District Court for the Northern District of Georgia. This case was dismissed on jurisdictional grounds pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The trial court held that Georgia's remedial scheme, including in particular O.C.G.A. § 48-2-35, provided a plain, speedy and efficient remedy. *Wetzel v. Collins*, USDC, ND Ga. No. 1:89-CV-758-ODE, Order of September 26, 1990.

Finally, Petitioner and two other retirees also filed a suit for injunctive and declaratory relief in state court. After the Georgia Supreme Court's decision in *Collins*, that suit was dismissed by the trial court because the plaintiffs had not followed the procedural requirements of O.C.G.A. § 48-2-35. (Appendix F).

After this dismissal, and once Petitioner became eligible under the refund statute to file suit, he initiated this action challenging Georgia's tax scheme and seeking refunds of illegally collected taxes. This case has become the test case for Georgia retirees seeking relief in the wake of *Davis*.

The trial court found that the Georgia tax scheme was unconstitutional and illegal under *Davis*. The trial court also held that the refund statute, O.C.G.A. § 48-2-35, applied and that it barred claims for refunds before 1985. The trial court concluded that no refunds were due because *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971) (Appendix E).

On appeal, the Georgia Supreme Court reversed the trial court and held that *Davis* must be applied retroactively, relying on *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991). Nevertheless, the Georgia Supreme Court went on to hold that Petitioner was not entitled to any relief, holding for the first time that Georgia's refund statute does not apply to an unconstitutional or illegal tax. That court further held, without authority, that a taxpayer must have made a demand for refund at the time the tax was paid in order to recover an unconstitutional or illegal

tax. *Reich v. Collins I*, 262 Ga. 625, 422 S.E.2d 846 (1992) (Appendix D). The questions sought to be reviewed here were first raised by that decision, and Petitioner's Motion for Reconsideration was denied. (Appendix C). Petitioner promptly filed a Petition for Writ of Certiorari to this Court.

As noted, this Court vacated and remanded for review in light of *Harper*, and the Georgia Supreme Court has continued to deny any relief to federal retirees. On the same day it issued *Reich II*, the Georgia Supreme Court also issued its second decision in *James B. Beam Distilling Co. v. Georgia*, Ga. S.Ct. Nos. S93A1217, S93A1218 (December 2, 1993) ("*Beam II*"). Also for the second time, it denied relief to the taxpayer.

REASONS FOR ALLOWING THE WRIT

Ultimately, this case is about federalism. Twice, this Court has remanded cases to the Georgia Supreme Court with directions to follow the standards of due process in considering the appropriate remedy for citizens subjected to unconstitutional taxation. In addition to *Reich I*, this Court reversed and remanded in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991). Twice, the Georgia Supreme Court has ignored the mandates of this Court and has denied due process or any kind of relief. *Reich v. Collins II*, *supra*, (Appendix A), *James B. Beam Distilling Co. v. Georgia II*, *supra*. If certiorari is not

granted in this case, then the minimum federal requirements of due process in Georgia will be zero.

Allowing the decision below to stand will also signal to other states that they have a free hand to impose discriminatory taxes, illegal taxes, and unconstitutional taxes, because the states will know the only risk they face is the repeal of the offending statute.

Further, this case will affect thousands of federal retirees in Georgia, and there are *Davis* cases still pending in Kansas, Mississippi, New York, North Carolina, Oklahoma, Utah, Virginia, and Wisconsin.[2] These cases also involve the due process and remedy issues presented here, and this Court will invite inconsistent and confusing results unless it provides definitive guidance in this case.

By definition, the people affected by *Davis* are retirees. In the four terms since *Davis*, this Court has repeatedly addressed issues relating to *Davis*.[3] Still, in at least ten states, there has been no final resolution. Retirees

---

[2]Since *Harper*, the Supreme Court of Iowa has issued a final ruling in favor of retirees. *Hagge v. Iowa Dept. of Rev. & Finance*, 504 N.W.2d 448 (1993). Also, since *Harper*, settlements involving refunds have been reported in Arizona, Arkansas, Montana and South Carolina.

[3]*James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991); *Harper v. Virginia Dept. of Treasury*, 501 U.S. ___, 111 S.Ct. 2881 (1991); *Bass v. South Carolina*, 501 U.S. ___, 111 S.Ct. 2883 (1991); *Barker v. Kansas*, ___ U.S. ___, 112 S.Ct. 1619 (1992); *Harper v. Virginia Dept. of Treasury*, 509 U.S. ___, 113 S.Ct. 2510 (1993).

continue to age, and many have died since *Davis*. The two issues presented here, the adequacy of predeprivation remedies and the impact of statutory refund rights, appear in some form in most of the other states. Resolving these issues will conclude the litigation for the majority of retirees, and it will complete the equation that includes *Davis*, *McKesson* and *Harper*.

I. GEORGIA HAS NOT PROVIDED ITS INCOME TAXPAYERS A PREDEPRIVATION REMEDY FREE OF DURESS.

Georgia must provide federal retirees meaningful backward looking relief or a predeprivation remedy without duress for taxpayers challenging an illegal or unconstitutional tax. *Harper*, slip op. pp. 12-14; *McKesson*, 496 U.S. at 36-40, 110 S. Ct. at 2250-2252. Without "duress" means that the prepayment procedure must be free of "financial sanctions" designed "to prompt" or "to encourage" taxpayers to tender tax payments before their objections are entertained and resolved. *Harper v. Virginia Dept. of Taxation*, slip op. pp. 12-13, n. 10 (1993); *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 32-38, 110 S. Ct. at 2248-51, n.21 (1990). Not only must these remedies be free of duress, these remedies must also be "clear and certain." *McKesson*, 496 U.S. at 32, 39, 41, 50, 110 S. Ct. at 2248, 2251, 2258. None of the Georgia procedures pass muster under *McKesson* or *Harper*.

The Georgia Supreme Court decision in this case defies logic. That court found that declaratory judgment and injunctive relief were available to Petitioner as predeprivation remedies. *Reich II*, slip. op., p. 3 (Appendix A, p. 4). In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), though, federal retirees with *Davis* claims sought this exact and precise relief; the Georgia Supreme Court refused that relief. The court ruled that declaratory relief was moot because the offending statute had been amended, and it ruled that injunctive relief in the form of an escrow fund was not proper because Georgia's refund statute provided an adequate remedy at law.

In this case, the Georgia Supreme Court cites *Beam II*, slip. op., p. 8, which in turn relies on *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988), for the proposition that declaratory and equitable relief were available. In *Collins*, the retirees also relied on *Private Truck*. Even though the Georgia Supreme Court denied that relief to federal retirees in *Collins* four years ago, it now says that that relief was in fact available.

The Georgia Supreme Court actually takes this absurdity one step further. In addition to the retirees in *Collins*, Petitioner himself filed a suit with two other retirees for equitable and declaratory relief. After *Collins* was decided, that suit was dismissed because petitioner had failed to follow the procedural requirements of the refund statute. (Appendix F). The Georgia Supreme Court now chastises Petitioner for not appealing that decision. *Reich II*, slip op.

p. 4 fn. 4. (Appendix A, p. 4). By the time of that dismissal, though, the Court had already decided *Collins* and had already held that federal retirees were not entitled to declaratory relief or equitable relief. Plainly, any appeal would have been useless.[4] These remedies were not clear and certain nor did they provide a meaningful opportunity to challenge the tax in a predeprivation hearing.

The *Reich II* majority next claims that there was a predeprivation remedy available under Georgia's Administrative Procedure Act (O.C.G.A. § 50-13-12), but no agency, not even the Department of Revenue, has the authority to strike or render void a tax statute. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975); see also *George v. Department of Nat'l Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983). Thus, the resort to administrative review also would have been completely useless; a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act. As the Georgia Supreme Court has held, such a challenge would have been "futile at the time of its making." *Flint River Mills*, *supra*, 234 Ga. at 386, 216 S.E.2d at 897. Again, the availability of a "futile" challenge does not satisfy *McKesson* and *Harper*.

The Georgia court also cites O.C.G.A. § 48-2-59 as providing a taxpayer the right of appeal of an assessment

---

[4]Had Petitioner filed an appeal, the Georgia Supreme Court could have exercised its right to assess a penalty for frivolous appeal. (Georgia Supreme Court Rule 14).

directly to superior court without the necessity of an administrative hearing. (*Reich II*, slip op. p. 4) (Appendix A, p. 5). Subsection (c) of this statute provides, however, that in order to secure review by the superior court, the taxpayer must file a surety bond or other security conditioned to pay the disputed tax if it is found to be due together with interest and costs. The surety posting the bond will require a substantial fee and some type of security from the taxpayer, with the result that some real or personal property of the taxpayer will be encumbered pending the outcome of the litigation. The only other alternative is if the taxpayer owns property in Georgia, but this is subject to fieri facias.

Requiring the taxpayer to post a security equal to the tax is almost as onerous as requiring payment of the tax. A surety bond or other security are immediate and substantial property interests. Thus, this procedure is not in any sense a predeprivation procedure at all because it immediately deprives the taxpayer of a property interest approximately equal to the tax. Rather, as the dissent in *Reich II* noted, "it is clear to me that Georgia has established 'various and summary remedies designed so that [taxpayers] tender tax payments before their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold payment and to obtain a predeprivation determination' of the tax assessment's validity . . .." (Emphasis in original). *McKesson v. Div. of Alcoholic*

Beverages and Tobacco, *supra* at 38 (III)(B)." *Reich II*, slip op. p. 7 (Appendix A, p. 12).

The thrust of the decision of the Georgia Supreme Court is that all these remedies were clear and certain and that Petitioner was simply mistaken in following the refund statute. The court offers no explanation why, if these other remedies were so clear and certain, officials of the Revenue Department were actively telling retirees to file amended returns setting forth their refund claims. The court offers no reason why, if declaratory and injunctive relief were available, the court denied this same relief to federal retirees four years ago.

Furthermore, the acceptability of any of these proposed remedies under *McKesson* and *Harper* also fails because of the duress of criminal and financial sanctions. To trigger any of these procedures, a retiree must first refuse to pay the tax and await assessment, levy or execution. In Georgia, any taxpayer who fails to pay income tax is subject to a penalty equal to 25% of the tax,[5] interest at the rate of 12% per annum,[6] and criminal prosecution.[7] "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real personal property, the tax is paid 'under duress' in the sense that the State has not

---

[5]O.C.G.A. § 48-7-86.

[6]O.C.G.A. § 48-2-40.

[7]O.C.G.A. §§ 48-7-2, 48-16-12(b).

provided a fair and meaningful deprivation procedure." *McKesson*, 496 U.S. at 38, 110 S. Ct. at 2251, n.21 (emphasis added). A penalty of 25% and interest at 1% per month are Draconian sanctions for retirees living on pensions. For retirees, the possibility of criminal prosecution is frightening. The majority in *Reich II* completely ignores these sanctions.

The Commissioner has argued that these financial sanctions do not really count because he has discretion to waive the penalty if the failure to pay was due to "reasonable cause" and not due to "willful neglect." O.C.G.A. §§ 48-2-43, 48-7-86(a)(2). For a taxpayer considering a constitutional challenge, there is absolutely no standard as to what is "reasonable cause" or "willful neglect." As the Georgia Supreme Court held in *Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975), "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed." For the taxpayer, the risk and the duress of financial sanctions are always present.

In this case, Petitioner mounted a bona fide, good faith, and reasonable challenge to the disparate tax treatment of federal and state retirees. Two years ago he won on the basic issue of the illegality of the tax. Still, he faces penalty and interest. Since April, 1989, Petitioner has faced 55 months at 1% per month plus the 25% penalty. Thus, he potentially faces an exposure equal to **180%** of the tax due,

and this number is still increasing. Despite three years of litigation, the Commissioner has not withdrawn the penalty and interest sought on Petitioner's assessment. If a taxpayer is subject to the penalty under these circumstances, it is absurd to suggest that the penalty is not real. Without any other factors, the 25% penalty and 55% interest constitute financial sanctions that make any prepayment procedure subject to duress.

Here, though, there is another factor: the threat of criminal prosecution. This sanction sets this case above and beyond any case decided to date. Every taxpayer in Georgia who fails to pay income tax faces the ultimate sanction of prosecution and conviction as a criminal. O.C.G.A. §§ 48-7-2, 48-16-12.

This risk is present regardless of the intentions of the Commissioner. For a taxpayer considering a challenge, not paying the contested tax always creates the risk that some prosecutor will pursue criminal prosecution. The only clear and certain way to avoid this risk is to pay the tax. The Commissioner has argued that this risk of criminal prosecution does not count because only an official acting unreasonably or in bad faith would use this threat. But O.C.G.A. § 48-2-81 imposes the following duty on law enforcement officials:

> It shall be the duty of all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax

laws of this State are prosecuted for all such violations.

Moreover, criminal prosecution is not unreasonable when the taxpayer's refusal to pay is based on frivolous objections. A State official who honestly believes the objections are frivolous and who prosecutes for failure to pay has not acted in bad faith. Yet the taxpayer has no way of knowing if State officials will regard the objections as bona fide or frivolous. *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) illustrates this problem. There, the taxpayer actually faced the threat of criminal prosecution even though his objections to the tax were bona fide and made in good faith. The Commissioner did not think much of the objections, and threatened prosecution. "Encouraged" by this threat, the taxpayer paid the tax.

While it may be true that the Commissioner has decided not to prosecute some taxpayers in the past, that does not remove the **risk** of prosecution contained in O.C.G.A. §§ 48-7-2, 48-16-12(b). As the taxpayer in *Wright* experienced, it is this risk of prosecution that creates the duress. *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286, 32 S. Ct. 216, 217 (1912).

Criminal prosecution, interest and a 25% penalty are not the only sanctions Georgia taxpayers face. The assessment procedure itself is wholly within the discretion of

the Revenue Commissioner.[8] The State has available additional remedies of levy, garnishment, and attachment.[9] None of these remedies available to the State are precluded by a protest or other taxpayer objections.[10] As the dissent in *Reich II* noted, these sanctions require a conclusion that Petitioner's payment of the unconstitutional taxes was not made "voluntarily," but was made under duress. (*Reich II*, slip op. p. 8; Appendix A, p. 14). Accordingly, these remedies do not satisfy due process.

Finally, the clear and certain standard of *McKesson* is not met because Georgia, like several other states,[11] has a refund statute that provides an unqualified right to refunds of illegal taxes. While neither *Harper* nor *McKesson* specifically address this circumstance, the clear and certain standard is violated when a state provides an attractive post-deprivation remedy and then eliminates it after the time for other relief has expired. As discussed in Part II, *infra*, the

---

[8]O.C.G.A. § 48-2-46.

[9]O.C.G.A. § 48-2-55.

[10]As if these penalties were not severe enough, the legislature has recently authorized an additional penalty of 50% and criminal prosecution as a felony. O.C.G.A. §§ 48-16-10(b), 48-16-12. Both of these new sanctions are "in addition to all other penalties" provided by law.

[11]See e.g., *N.Y. Tax Law* § 686; *Va. Code Ann.* § 58.1-1826.

post-deprivation remedy is a property right, and its elimination is itself a due process violation.

Whether or not it is a property right, though, the presence of the refund remedy imposed a remedy roulette on retirees. Regardless of the merit of any other remedy, the purported availability and attractiveness of the refund statute made Georgia's entire remedial scheme unclear and uncertain. Retirees were required to choose from several apparent remedies. Once their choices were made, they were fixed, and the remedy roulette wheel began to spin. If they placed their bets on the "wrong" remedy, they lost the gamble, the illegal tax and any right to relief. The clear and certain mandate of *McKesson* is not met under these circumstances.

In Georgia, by far the most attractive remedy was the refund statute because the retiree taxpayer avoided penalties, interest, and the risk of criminal prosecution. *Davis* was decided on March 28, 1989. Taxes for 1988 were not due until April 17, almost three weeks later. Despite *Davis*, the State announced that unpaid taxes on retiree income for 1988 were still due and owing. In that three week period, thousands of federal retirees filed refund claims. None ever sought administrative review. None ever sought review in superior court. The few retirees who sought declaratory and injunctive relief were defeated. These facts defy any finding that these remedies were clear and certain.

II. A STATE MAY NOT COLLECT TAXES FROM ITS CITIZENS IN VIOLATION OF THE CONSTITUTION, PROVIDE A RIGHT TO REFUNDS FOR THE UNCONSTITUTIONAL TAXATION, AND THEN ELIMINATE THE RIGHT TO REFUNDS AFTER THE TIME HAS PASSED FOR ANY OTHER RELIEF.

For more than 50 years, Georgia's refund statute, O.C.G.A. § 48-2-35, has provided an unqualified right to refunds of taxes "illegally assessed and collected." As noted, other states have similar statutes. Despite extensive briefing by both parties, the decision of the Georgia Supreme Court in this case completely ignores this statute. Without discussion, the court simply refuses Petitioner the remedy provided in this statute. When a state provides its citizens a remedy for unconstitutional taxation and then eliminates that remedy after the time has run for any other relief, it violates due process. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451 (1930).

Brinkerhoff is closely analogous to the present case. In *Brinkerhoff*, the taxpayer brought an equitable action against a Missouri county for discriminatory taxation. The state answered that equitable relief was not available because the taxpayer had not pursued its administrative remedy. The Missouri Supreme Court agreed, found that the plaintiff was guilty of laches in failing to pursue that remedy, and held that the plaintiff was not entitled to relief. The problem was

that Missouri law had until that point held that the administrative commission did not have power to grant relief from the kind of discrimination that was alleged.

This Court reversed because the plaintiff had been denied due process: "The possibility of the relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] Supreme Court filed its opinion . . .. Then it was too late for the plaintiff to avail itself of the newly found remedy." *Id.* at 453.

Here, no one ever suggested to Petitioner that the refund statute was unavailable until the decision of the Georgia Supreme Court in November 1992. The state never pled or argued that the refund statute did not apply. Indeed, the state successfully argued to the trial court that it did apply to Petitioner to bar claims before 1985.

While the Georgia Supreme Court now says Petitioner should have sought declaratory and equitable relief, four years ago it said that relief was unavailable. *Collins v. Waldron,* 259 Ga. 582, 385 S.E.2d 74 (1989). When Petitioner sought this relief, he was also told it was unavailable and that he had to follow the refund statute. Just like the court in *Brinkerhoff*, the Georgia Supreme Court has played a remedy shell game to preclude any relief for Petitioner.

Moreover, *Brinkerhoff* is not alone in holding that state enacted remedies can create property interests protected by due process See also, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985); *Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982).

There can be no genuine dispute that, until Reich I, it was settled Georgia law that the refund statute provided relief for illegal and unconstitutional taxes. The legislative history of O.C.G.A. § 48-2-35 establishes that the original intent of the statute was to provide refunds of taxes paid into the State Treasury under laws that were later declared unconstitutional. The statute was originally enacted on January 3, 1938, Ga. L. Ex. Sess. 1937-38, pp. 77, 94-95. The statute was prompted by an Executive Report to the General Assembly from the Governor, Eugene Talmadge. In his report, Governor Talmadge stated:

> I am attaching a file, marked Exhibit A, which is made a part of this report, showing certain taxes that have been paid into the state treasury under laws that have since been declared unconstitutional. There is no provision, without an act of the legislature, to pay these taxes to these debtors of the state who have paid these unconstitutional taxes. This is a moral obligation of the state.

1 H.J. 1937, 565, reported at *Eibel v. Forrester*, 195 Ga. 439, 441, 22 S.E.2d 26, 27 (1942).

At least as early as *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the Georgia Supreme Court ruled that the refund statute was applicable to a claim for recovery of unconstitutional taxes. Because the plaintiff in *Wright* had an adequate remedy at law under the refund statute, that Court held he was not entitled to equitable relief in the form of mandamus.

Similarly, in *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Court affirmed the dismissal of a mandamus seeking sales tax refunds because the refund statute provided an adequate remedy for the plaintiff's claim that refusal to refund the tax was unconstitutional. This same rationale was applied in *Blackmon v. Georgia Independent Oilmen's Assoc.*, 129 Ga. App. 171, 198 S.E.2d 896, 898 (1973) and *Blackmon v. Premium Oil Stations*, 129 Ga. App. 169, 198 S.E.2d 900, 901 (1973). In both of these cases, taxpayer claims for refunds of illegal taxes were dismissed because the taxpayers did not follow the refund statute procedure.

Finally, in *State v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988), the Georgia Supreme Court applied the limitation period in the refund statute to bar claims for unconstitutional taxes that were more than three years old. This Court held that, "The trial court erred in holding the statute of limitations to O.C.G.A. § 48-2-35 is tolled such that plaintiffs may revive unasserted claims for refunds which might have existed prior to the filing of the complaint." 258 Ga. at 530, 371 S.E.2d at 381.

The effect of this ruling was that the statute of limitations under the refund statute continued to run for all taxpayers whose claims had not been asserted.[12]

Further, as discussed above, *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), addressed the specific tax at issue here. The plaintiff sought an injunction and equitable relief in the form of an escrow fund for the accumulation of taxes paid after *Davis*. Although the plaintiff was initially successful, the Georgia Supreme Court dismissed the action as moot in view of the legislature's repeal of the offending statute. The escrow fund for taxes collected after *Davis* was not a moot issue because it was not addressed by the legislation.

The refund statute was fundamental to the ultimate decision in that case. The central issue pending before this Court was the propriety of an injunction requiring the Commissioner to "maintain an escrow fund for all payments of income taxes attributable to federal pensions" pending a ruling on the constitutionality of the tax. *Id.* at 582, 385 S.E.2d at 74. The escrow fund, an equitable remedy, was appropriate if and only if there was no adequate remedy at law available to the taxpayers for recovery of the illegal *Davis* type tax. The Commissioner vigorously and

---

[12]In *Beam II*, the Georgia Supreme Court cited *Private Truck* for the proposition that the refund statute provides a "means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional." *Beam II*, slip op. p. 3, n. 3.

successfully argued in that case that the refund statute, O.C.G.A. § 48-2-35, was an adequate remedy at law and that that statute provided a means for taxpayers to recover refunds of the unconstitutional and illegal *Davis* type tax. The court accepted these arguments and held that the refund statute provided an "adequate remedy" obviating the need for equitable relief, 259 Ga. at 583, 385 S.E. at 75, n.1.

In this case, the trial court found that Col. Reich's claims under O.C.G.A. § 48-2-35 for refunds of taxes for the years 1980 through 1984 were barred by the three-year limitations period set out in the statute. If the refund statute applies to claims for unconstitutional taxes for 1980 through 1984, it must also apply to claims for 1985 through 1988.

Undeniably, Georgia case law establishes that the refund statute applies to Petitioner's claims here. The overwhelming weight of Georgia authority mandates this result.

The Georgia Supreme Court, however, has continued its remedial shell game in *Reich II* and *Beam II*. In *Reich I*, that court held in the second division that the refund statute did not apply to unconstitutional taxes. In *Reich II*, the Court notes that this Court vacated *Reich I*, and the Georgia court "expressly" incorporated Division One of *Reich I*. Slip op. p. 3 (Appendix A, p. 3). But the court is silent about Division Two of *Reich I*.

The problem for that court is that if the refund statute applies to retirees, predeprivation remedies do not matter; retirees are entitled to refunds. But, if the refund statute

does not apply to unconstitutional taxes, the state loses its defense based on standing in the *Beam* case. The standing defense is peculiar to the refund statute, so the statute must apply for the defense to apply.

The court's "solution" to this problem was to apply the statute in *Beam II* but not in *Reich II*. On the same day the court issued two decisions regarding the remedy for unconstitutional taxation. In one case, the court assumed the refund statute applies; in the other case, it did not. If the concept of law has any meaning, it cannot be both. The court offered no explanation for this contradiction

Unless this Court addresses these circumstances, an injustice will be allowed to stand, and other courts will be encouraged to follow the lead of the Georgia Supreme Court. As this Court held in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682, 50 S. Ct. 451, 454 (1930), "[a] state may not deprive a person of all existing remedies for the enforcement of a right" unless there is "afforded to him some real opportunity to protect it."

CONCLUSION

Over a four year period, the courts of Georgia have told Petitioner the following:

(1) Declaratory and equitable relief are not available to federal retirees with *Davis* claims, and the refund

statute provides an adequate remedy at law. *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989).

(2) You cannot get declaratory or equitable relief because you must follow the procedure of the refund statute. *Salter v. Georgia* (1990) (Appendix F).

(3) Because the refund statute applies to your case, the limitations period in that statute bars claims before 1985. *Reich v. Collins I* (1991) (Appendix E).

(4) Declaratory and equitable relief really were available to you four years ago, and you cannot complain now because you did not appeal. *Reich v. Collins II* (1993) (Appendix A).

(5) The refund statute applies to liquor distillers with claims for unconstitutional tax. *James B. Beam Distilling Co. v. Georgia II*, Ga. S.Ct. Nos. S93A1217, S93A1218 (December 2, 1993) slip op. p. 3, n. 3.

(6) Even though the refund statute applies to you to bar claims before 1985, and even though it applies to liquor distillers with similar claims, it does not apply to you for claims after 1985. You are not entitled to an explanation of these contradictions. *Reich v. Collins II* (1993) (Appendix A).

There is nothing "due" about this "process." Petitioner has been deprived of rights protected by federal statute and the U.S. Constitution, and he has received no remedy. For the reasons set forth above, Petitioner requests this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Carlton M. Henson
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Center
Suite 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

Decided: December 2, 1993

S92A0621. *Reich v. Collins, et. al.*
S92A0622. *Reich v. Collins, et. al.*

CLARKE, Chief Justice.

In *Reich v. Collins*, 262 Ga. 625 (422 SE2d 846) (1992) (*Reich v. Collins I*), we were faced with the issue of whether appellant Reich was entitled to a refund of state income taxes paid on his federal military retirement benefits in view of the decision of the United States Supreme Court in *Davis v. Michigan,* 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The latter case held that a state taxing scheme which exempts state retirement befits from the state income taxation but does not so exempt federal retirement benefits violates the United States Constitution.[1] The initial issue to be determined in *Reich v. Collins I* was whether *Davis v. Michigan* should be applied retrospectively to Reich's claim. We held that, under recent decisions of the United States Supreme Court, retrospective application was

[1]Former OCGA 48-7-27 created a state income taxing scheme, a portion of which was unconstitutional under the authority of *Davis v. Michigan*. After the U.S. Supreme Court decided *Davis*, the Georgia legislature repealed the unconstitutional provisions of the code section.

required, but ultimately concluded that state law barred Reich's claim to a refund under OCGA 48-2-35(a).

The U.S. Supreme Court subsequently granted Reich's petition for certiorari. That Court vacated the judgment in *Reich v. Collins I*, and remanded the case to us "for further consideration in light of *Harper v. Virginia Department of Taxation*," 509 U.S. ___ (113 SC 2510, 509 LE2d ___) (1993).

In *Harper*, the United States Supreme Court reversed decision of the Virginia Supreme Court which held that the appellants in that case were not entitled to refunds of state income taxes because *Davis v. Michigan* should be applied prospectively only. The U.S. Supreme Court initially determined that *Davis v. Michigan* applies retrospectively. It then remanded *Harper* to the Virginia Supreme Court to follow the Constitutional mandate of providing relief "consistent with federal due process principles." *Harper*, 113 SC at 2519.

Due process requires that a state provide procedural safeguards against the unlawful exactions of taxes, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (110 SC 2238, 2250, 100 LE2d 148) (1990), but the state retains some flexibility in the type safeguards it must provide. *Harper*, supra, 113 SC at 2519; *James B. Beam Distilling Co. v. The State of Georgia*, S93A1217, (Decided December ___, 1993). In remanding *Harper*, the United States Supreme Court held that

> If Virginia 'offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38, n. 21] . . . On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' 113 SC at 2519.[2]

In the first division of *Reich v. Collins I*, we held, consistent with *Harper v. Virginia*, that *Davis v. Michigan* must be applied retrospectively. Because the U.S. Supreme Court has vacated our judgment in that case, we expressly incorporate Division One of *Reich v. Collins I* into this opinion. We therefore conclude that our duty on remand is

---

[2]In *McKesson*, the Court suggested that "meaningful, backward-looking relief" could include a refund, *Id.* at 2251, or the assessment and collection of back taxes from those who received favored treatment in violation of the Constitution, *Id.* at 2252.

to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in *Harper* and *McKesson*, supra. While the selection of a remedy to be afforded is an issue of state law, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___ (111 SC 2439, 115 LE2d 481, 488) (1991), this remedy must satisfy "minimum federal requirements." *Harper*, supra, 113 SC at 2520.

We have recently held in *James B. Beam Distilling Co. v. The State of Georgia*, S93A1217, supra, that the declaratory judgment remedies under OCGA 9-4-1 et seq., as well as statutory injunctive relief remedies available provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fall due.[3] As such, these remedies are of themselves sufficient to satisfy federal due process requirements.[4]

Additionally, there are predeprivation remedies under the Georgia Administrative Procedure Act of which a taxpayer may avail himself when making a constitutional

---

[3]In *McKesson*, supra, 110 SC at 2250, the Court held that "[t]he State may choose to provide a form of predeprivation process,' for example by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment . . ."

[4]Reich maintains that these are not viable remedies because his lawsuit seeking a declaratory judgment that the tax at issue in this case was unconstitutional was dismissed by the superior court. However, Reich did not appeal that decision.

challenge to a state tax. Under OCGA 50-13-12, a taxpayer who is aggrieved by "any act" of the Department of Revenue "in a matter involving . . . liability for taxes," is entitled to a hearing before the Department. OCGA 50-13-19 and OCGA 5-13-20 provide for judicial review to a taxpayer dissatisfied with a decision by the Department of Revenue in a case brought under OCGA 50-13-12.

Further pursuant to OCGA 48-2-59, a taxpayer may appeal an assessment by the Department of Revenue directly to the superior court, without the necessity of an administrative hearing.

We conclude that there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge the requirements of federal due process as set forth in *McKesson* and *Harper*, supra. Consequently, Reich's due process rights have not been violated by the Department's failure to refund to him that portion of income taxes paid in violation of *Davis v. Michigan*.

Judgment affirmed in part and reversed in part. All the Justices concur except Sears-Collins and Carley, JJ., who dissent.

CARLEY, Justice, dissenting.

Former OCGA § 48-7-27 provided that state retirement benefits were exempt from income taxation by the State by that federal retirement benefits were not. However, the unconstitutionality of this former provision was established by the holding in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The mandate of *Davis* is to be applied retroactively, rather than prospectively. *Harper v. Va. Dept. of Taxation*, 509 U.S. ___ (113 SC 2510, 125 LE2d 74 (1993). Appellant is a Georgia taxpayer who seeks a refund of income taxes that he previously paid to the State pursuant to the unconstitutional provisions of former OCGA § 48-7-27. There is no question of appellant's standing to seek such a refund. Compare *James B. Beam Distilling Co. v. State of Ga.*, ___ Ga. ___ (Case Number S93A1217, decided December 2, 1993). However, the majority nevertheless holds that appellant is not entitled to seek a refund because federal due process has otherwise been satisfied. In my opinion, appellant is entitled to the refund that he seeks and I must, therefore, dissent.

Where, as here, a taxpayer seeks a refund of state taxes that he has paid pursuant to a statute which is in contravention of the federal constitution, "[s]tate law may provide relief beyond the demand of federal due process, [cit.], but under no circumstances may it confine [the

taxpayer] to a lesser remedy, [cit.]." *Harper v. Va. Dept. of Taxation*, supra at ___ (III). The minimum parameters of federal due process are clear. If a State has offered "'a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [Cit.] On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' [Cit.] In providing such relief, a State may either award full refunds to those burdened by the unlawful tax or issue some other order that 'create(s) in hindsight a nondiscriminatory scheme.' [Cit.]" *Harper v. Va. Dept. of Taxation*, supra at ___ (III). In responding to the unconstitutionality of former OCGA § 48-7-27, Georgia did not create "in hindsight a nondiscriminatory scheme" by assessing and collecting back income taxes from those taxpayers whose state retirement benefits had previously been exempted from taxation. See *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 40 (III) (B) (110 SC 2238, 100 LE2d 148) (1990). Georgia merely repealed the unconstitutional provisions of that former statute. Accordingly, appellant is constitutionally entitled to a refund unless he had available to him at the time that he paid the taxes a meaningful opportunity to withhold their payment and to challenge their validity in a

predeprivation hearing. "[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed 'voluntary.' . . . '(W)here voluntary payment (of a tax) is knowingly made pursuant to an illegal demand, recovery of that payment may be denied.'" *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B), fn. 21. The issue for resolution is, therefore, whether appellant paid the unconstitutional taxes "voluntarily" or under "duress."

In my opinion, nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his payment of taxes pursuant to the unconstitutional provisions of former OCGA § 48-7-27. The majority cites OCGA § 48-2-59 as affording appellant such an opportunity. Subsection (a) of that statute does provide generally for an "appeal from any order, ruling, or finding of the commissioner to the superior court . . ." However,, subsection (c) further provides that, in order to secure review by the superior court, the taxpayer must file a surety bond or other security "conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of the court, together with interest and costs." By conditioning the taxpayer's right to appeal upon the posting of "a surety bond or other security," OCGA § 48-2-59 does not, in my

opinion, satisfy "'"the root requirement" of the Due Process Clause . . . "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest,"' [cit.]. . ." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 37 (III) (B). To the contrary, that statute is merely one of the "various sanctions and summary remedies [contained in the tax code which are] designed so that [taxpayers] tender tax payments before their obligations are entertained and resolved." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

Thus, I cannot agree with the majority that OCGA § 48-2-59 satisfies minimum federal due process requirements such that appellant's failure to have resorted thereto renders his payment of the unconstitutional state income taxes "voluntary" and nonrefundable. "A State tha 'establish(es) various sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved' does not provide taxpayers 'a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity.' [Cit.] Such limitations impose constitutionally significant '"duress"' because a tax payment rendered under these circumstances must be treated as an effort 'to avoid financial sanctions or a seizure of real or personal property.' [Cit.] The State accordingly may not confine a taxpayer under duress to prospective relief."

(Emphasis in original.) *Harper v. Va. Dept. of Taxation*, supra at ___ (III), fn. 10.

The majority also finds that the Administrative Procedure Act (APA) afforded appellant a constitutionally meaningful predeprivation remedy for contesting his payment of the unconstitutional taxes. Subsection (a) of OCGA 50-13-12 does provide that the "Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes . . ." However, appellant was not "aggrieved by any act of the department," but by an allegedly unconstitutional act of the legislature. Even assuming that the department would have had initial jurisdiction under the APA to entertain a challenge to the constitutionality of former OCGA § 48-7-27, such a challenge would be "futile at the time of its making." *Flint River Mills v. Henry*, 234 Ga. 385, 386 (216 SE2d 895) (1975). Thus, to secure a ruling on the constitutionality of former OCGA § 48-7-27 pursuant to the APA, appellant would presumably have been required to undergo an entirely "futile" hearing before the department and then incur the additional expenditure of time and money pursuing an appeal to the superior court. The availability of such an attenuated process cannot, in my opinion, be deemed to have provided appellant "with all of the [predeprivation] process [he] is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any . . . [pre]deprivation of

property." *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 40 (III) (B).

Moreover, nothing in OCGA § 50-13-12 authorizes the taxpayer to withhold his taxes pending resolution of his purported administrative remedy and compels the department to forego the various sanctions and summary remedies that it is otherwise authorized to employ against the taxpayer under the tax code. Subsection (c) of that statute merely provides that, pending the hearing and decision, the department "may suspend or postpone the effective date of its previous action." (Emphasis supplied.) Thus, "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed ([cit.])." *Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508 (I) (212 SE2d 341) (1975). Since the administrative remedy relied upon by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies designed to encourage timely payment prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure. [Cits.]" *McKesson v. Div. of*

Alcoholic Beverages and Tobacco, supra at 38 (III) (B), fn. 21.

The majority also relies upon the Declaratory Judgment Act as affording appellant a constitutionally meaningful predeprivation remedy. However, there is considerable doubt whether any general remedial statute, such as a declaratory judgment act, can ever be considered to be an available "clear and certain remedy" such that a taxpayer's failure to have invoked those provisions can be deemed to evidence his "voluntary" payment of the controlling decisions of the Supreme Court of the United States, the determination of the availability of a taxpayer's "clear and certain" predeprivation remedy should be confined to a consideration of the specific tax structure enacted by the State, and not be based upon the existence of general remedies which, with the benefit of hindsight, can be urged to have otherwise been available to the taxpayer. See *Harper v. Va. Dept. of Taxation*, supra, and *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra, neither of which discuss the availability of general, rather than specific, taxpayer relief. Confining our inquiry to the specific statutes, such as OCGA §§ 48-2-59 and 50-13-12, which do relate to the resolution of tax disputes, it is clear to me that Georgia has established "various sanctions and summary remedies designed so that [taxpayers] tender tax payments before their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold

payments and to obtain a predeprivation determination of the tax assessment's validity . . ." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

In any event, I cannot agree with the majority's conclusion that the Georgia Declaratory Judgment Act can be considered to be such a "clear and certain remedy" that appellant's failure to have invoked its provisions evidences his "voluntary" payment of the unconstitutional taxes. As is true in the case of the administrative remedy, there is nothing in our Declaratory Judgment Act which authorizes the taxpayer to withhold his taxes pending resolution of his claim or which compels the department to forego employment of the various sanctions and summary remedies that it is otherwise authorized to pursue under the tax code. The trial court is authorized to grant the taxpayer injunctive relief, but the exercise of that authority is discretionary and a taxpayer cannot, therefore, be assured that the department's collection procedures will be stayed. Since the declaratory judgment remedy advanced by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process.

For all reasons stated, I believe that appellant's payment of the unconstitutional taxes was not made

"voluntarily," but was made under "duress." I believe, therefore, that the majority opinion erroneously "confine[s] [appellant] to a lesser remedy" than that which federal due process demands. *Harper v. Va. Dept. of Taxation*, supra at ___ (III). Accordingly, I must respectfully dissent to the majority's failure to afford appellant the "meaningful backward-looking relief" of the refund to which he is constitutionally entitled. *Harper v. Va. Dept. of Taxation*, supra at ___ (III).

I am authorized to state that Justice Sears-Collins joins in this dissent.

APPENDIX B

IN THE SUPREME COURT OF THE UNTIED STATES

June 28, 1993

CHARLES J. REICH,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 92-1276
	)	
MARCUS E. COLLINS,	)	
ET. AL.,	)	
	)	
Respondent.	)	

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. ___ (1993).

ss/_____
William K. Suter, Clerk

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

December 17, 1992

The Honorable Supreme Court met pursuant to adjournment. The following Order was passed:

CHARLES J. REICH V. MARCUS E. COLLINS, SR., COMR., ET. AL.

Upon consideration of the Motions for Reconsideration filed in these cases, it is ordered that they be hereby denied. All the Justices concur, except Bell, P.J., disqualified, and Hunstein, J., not participating.

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

Decided: November 19, 1992

S92A0621: REICH V. COLLINS, ET. AL.

S92A0622: REICH V. COLLINS, ET. AL.

CLARKE, Chief Justice

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan,* 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in Georgia. In *Davis v. Michigan,* supra, the United States Supreme Court held

that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.[1] Because the state of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, in determining whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan,* the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

[1]This code section permits the States to tax "pay or compensation for personal services as [a federal] officer or employee. . . if the taxation does not discriminate against the employee because of the source of the pay or compensation."

The case came before the trial court on cross-motions for summary judgment. The trial court concluded that former OCGA § 47-7-27 violated the principles of *Davis v. Michigan,* supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson,* 404 US 97 (92 SC 349, 30 LE2d 296) (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.[2] However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia,* 501 U.S. ___ (111 SC 2439, 115 LE2d 481) (1991), rather than the test set out in *Chevron Oil*, supra.

In *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (104 SC 3049, 82 LE2d 200 (1984), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Commerce Clause. Following this decision, James B. Beam

[2]We note that the State did not appeal this ruling by the trial court.

Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363 (382 SE2d 95) (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, supra. However, analyzing the case under *Chevron Oil*, supra, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," 115 LE2d. at 490, and thus the decision is to be applied not only to the parties before it, but "to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party

prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* at 490-491.[3]

The State's argument in the case before us is that because it cannot be determined from the Court's opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The State of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined

---

[3]The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, 115 LE2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* at 493, limits the "possible applications of *Chevron Oil*." *Id.*

that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only,[4] and thus not applicable to the litigants before it, that the state of Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas,* ___ U.S. ___ (112 SC 1619, ___ LE2d ___) (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Michigan v. Davis* retroactively to the litigants in *Barker*,

[4]See *Beam*, 115 LE2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis, the prospective method of overruling cases does not apply the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky,* 479 U.S. 314 (107 SC 708, 93 LE2d 649) (1987), and "appears never to have been endorsed [by the Court] in the civil context." *Beam*, 115 LE2d at 490.

just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.[5]

We thus conclude that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan,* but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, 115 LE2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . ." *Beam*, 115 LE2d at 494.

OCGA § 48-2-35(a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily . . ." (Emphasis supplied.)

[5]We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil,* and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation,* 401 SE2d 868 (Va. 1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. 59 USLW 3863 (July 2, 1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*. 410 SE2d 629 (1991). On May 18, 1992, the U.S. Supreme Court granted certiorari to that decision. 60 USLW 3779.

We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assessed and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler,* 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.,* 129 Ga. App. 169 (198 SE2d 900) (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

We that this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part. Hunt, Benham, and Fletcher, JJ., concur; Sears-Collins, J., concurs in judgment only; Bell, P.J., disqualified.

APPENDIX E

IN THE SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

CHARLES J. REICH,	)
	)
Plaintiff,	) CIVIL ACTION FILE
	) NO.: 90-cv-18388-4
v.	)
	) FILED: Dec. 11, 1991
MARCUS E. COLLINS, SR.,	)
Individually and in his	)
capacity as Georgia State	)
Revenue Commissioner, and the	)
GEORGIA DEPT. OF REVENUE,	)
	)
Defendants.	)
	)

ORDER

FACTS:

This action was filed April 19, 1990, as a complaint for refund of income taxes paid on military retirement income during the years 1980 through 1988. Under a

previous Georgia law, Section 48-7-27, O.C.G.A., repealed in 1989, retirement income from state government was exempted from income taxation while retirement income from the federal government was not. In *Davis v. Michigan Department of the Treasury,* 489 U.S. 803 (1989), the United States Supreme Court struck down a similar Michigan law both on constitutional grounds and because it violated 4 U.S.C. Section 111. The Plaintiff contends that taxes collected on his military retirement benefits during the years of 1980 through 1988 must be refunded to him in light of this decision. Defendants Marcus E. Collins and the Georgia Department of Revenue have filed a Motion for Summary Judgment on several grounds. The Plaintiff has also moved this Court to grant his Motion for Summary Judgment. These Motions for Summary Judgment were argued on October 18, 1991.

ISSUES PRESENTED:

I. Whether under Georgia law the statute of limitations will permit the Plaintiff's claim?

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?

III. Whether *Davis* should be applied retroactively?

DISCUSSION:

I. Whether under Georgia law the statute of limitations will limit the Plaintiff's claim?

Section 48-2-35(b)(1), O.C.G.A., provides that a claim for the refund of a tax illegally assessed and collected may be made anytime within three (3) years after the date of the payment to the commissioner. Because the statute is a waiver by the State of its sovereign immunity, it must be strictly enforced. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974). This statute of limitations applies even where the refund is based in part on federal law. *McKesson v. Division of Alcoholic Beverages and Tobacco,* 58 U.S.L.W. 4665 (U.S. June 4, 1990); *Michael v. Louisiana,* 350 U.S. 91 (1955). In the case de jure the Plaintiff contends that the three-year statute of limitation codified in O.C.G.A., 48-2-35, should not apply to those taxes collected under an unconstitutional statute, citing the Georgia Supreme Court's reasoning in *James B. Beam Distilling Co. v. Georgia,* 259 Ga. 363, 382 S.E. 2d 95 (1989). The Georgia Supreme Court in *Beam* merely defines the authority which was conferred upon the courts to determine retroactivity of its decision under O.C.G.A., 48-2-35. *Beam* does not, as the Plaintiff argues, reject the basic tenets of O.C.G.A., 48-2-35, as it applies to taxes assessed under an unconstitutional statute. Therefore, because the Plaintiff's claims were filed in April of 1989, and the statute

of limitations does not apply, the Plaintiff could get no refund for taxes paid in 1980 through 1984.

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?.

The Defendants argue that the repealed Georgia statute must be sustained if it bore a reasonable relation to a legitimate state purpose. *Exxon Corporation v. Eagerton,* 462 U.S. 176 (1983). They point out that the preferential income tax treatment given to state retirees is designed to enable the State to hire better employees.

Federal law, however, expressly prohibits state taxation plans which discriminate against federal employees based solely on the source of the pay or compensation. 4 U.S.C., Section 111 (1939). The court in the *Davis* case found that Michigan's discriminatory tax scheme, which was almost identical to Georgia's, violated this statute. In *Davis*, Michigan was not able to demonstrate "significant differences" between federal civil service retirement income and the state retirement income exempted from taxation.

The Defendants before this Court contend that there are significant differences between military retirement pay and state retirement pay because military retirees are still subject to being ordered back into service. Thus, their pay is, at least in part, pay for present services. *McCarty v. McCarty,* 453 U.S. 210, 221-222 (1981).

This argument does not account for the fact that the Georgia statute at issue taxed all federal civil service retirement pay, not specifically military benefits. Thus, it is difficult to accept the Defendants' claim that by taxing military retirement while exempting state retirement, the State was merely taxing a reduced current pay for reduced services. Therefore, because the sole distinction between the two groups of taxpayers is the source of income, one state and one federal, the statute which treated these taxpayers differently violated the principles of *Davis*.

III. Whether *Davis* should be applied retroactively?

In *Davis v. Michigan Department of The Treasury*, 489 U.S. 803 (1989), the Michigan Department of The Treasury conceded that should its tax scheme be found illegal, the plaintiff, Davis, would be entitled to a refund. For this reason, the U.S. Supreme Court did not reach the issue of whether its decision should be applied retroactively. This silence leaves the issue of retroactivity to be resolved by the valid three-pronged test of *Chevron Oil v. Hudson*, 404 U.S. 97, 106-107 (1971). For a decision to be applied non-retroactively, it must first establish a new principle of law. Second, courts must look to the purpose of this rule to determine whether retroactive application will further or retard its operation. Third, courts must weigh the inequities or hardships imposed by retroactive application.

Three other state supreme courts, in North Carolina, South Carolina and Virginia, have already applied this *Chevron Oil* test to the *Davis* decision and decided that *Davis* applies prospectively only. *Ball v. State,* 395 S.E.2d 171 (S.C. 1990); *Harper v. Virginia Department of Taxation,* 241 Va. 232, 401 S.E.2d 868 (1991); *Swanson v. State of North Carolina,* No. 64PA91 (N.C. S.Ct., filed Aug. 14, 1991).

The *Davis* decision does not seem to be one that should be applied retroactively under the *Chevron Oil* test. According to Defendants' Brief in Support of Motion for Summary Judgment, at page 16, twenty-two (22) states other than Georgia had tax statutes similar to Michigan's. Thus, *Davis* did announce a new rule of law which was not clearly foreshadowed by prior decisions. Moreover, retroactive application would not further the principles of intergovernmental tax immunity, which is to attract qualified individuals to federal employment. Instead, retroactivity would act to punish the State for its past treatment of federal retirees. Finally, the equities are in favor of prospective application only, as retroactive application could create a hardship for the Defendants.

ORDER OF COURT

Wherefore, for the reasons discussed above, Defendants' Motion for Summary Judgment is hereby granted on the basis that *Davis v. Michigan* does not apply retroactively. It is also granted in part since the statute of

limitations has run on claims for refunds of taxes paid in the years 1980 through 1984.

Likewise, the Plaintiff's Motion for Summary Judgment is granted in part in that the Georgia statute in question was violative of the principle set forth in *Davis*. Other than as previously stated, the Plaintiff's and the Defendants' Motions for Summary Judgment are hereby denied.

SO ORDERED this 10th day of December, 1991.

/s/_____
Kenneth Kilpatrick
Judge, Superior Court
Clayton Judicial Circuit

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AVERY T. SALTER, JR., CHARLES J. REICH, and ROBERT L. NEAL,	)
Plaintiffs,	)
v.	) CIVIL ACTION FILE NO. D-71448
THE STATE OF GEORGIA, GOVERNOR JOE FRANK HARRIS, AND STATE REVENUE COMMISSIONER MARCUS E. COLLINS, SR.,	)
Defendants.	)

ORDER

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to

be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford,* 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A § 48-2-35 is the filing of a claim for refund by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.,* 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter,* 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A § 48-2-35(b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See Id.

This 27th day of MARCH, 1990.

/s/_____
Joel J. Fryer
Judge, Fulton Superior Court, A.J.C.

APPENDIX G

O.C.G.A. § 48-2-35

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b) (1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or his counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident and maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this

subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

O.C.G.A. § 48-2-59

(a) Except with respect to claims for refunds, either party may appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer, except that:

(1) If the taxpayer is a public utility or nonresident, the appeal of either party shall be to the superior court of the county in which is located the taxpayer's principle place of doing business or in which the taxpayer's chief or highest corporate officer residing in this state maintains his office; or

(2) If the taxpayer is a nonresident individual or a foreign corporation having no place of doing business and no officer or employee residing and maintaining his office in this state, the taxpayer shall have the right to appeal to the Superior Court of Fulton

County or to the superior court of the county in which the commissioner in office at the time the action is filed resides.

(b) The appeal and necessary records shall be certified by the commissioner and shall be filed with the clerk of the superior court within 30 days from the date of decision by the commissioner. The procedure provided by law for applying for and granting appeals form the probate court to the superior court shall apply as far as suitable to the appeal authorized by this Code section, except that the appeal authorized by this Code section may be filed within 30 days form the date of decision by the commissioner.

(c) Before the superior court shall have jurisdiction to entertain an appeal filed by any aggrieved taxpayer, the taxpayer shall file with the clerk of the superior court a written statement whereby the taxpayer agrees to pay on the date or dates the taxes become due all taxes for which the taxpayer has admitted liability. Additionally, the taxpayer shall file with the clerk of the superior court within 30 days from the date of decision by the commissioner, except where the value of the appellant's title or interest in real property owned in this state is in excess of the amount of the tax in dispute, a surety bond or other security in an amount satisfactory to the clerk, conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of

the court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as provided by law.

(d) (1) If the final judgment of the court places upon the taxpayer any tax liability which has not already been paid and if the tax or any part of the tax has:

(A) Not become due on the date of the final judgment of the court, then the taxpayer shall pay the amount of the unpaid tax liability on the due date or dates as provided by law; or

(B) Already become due at the time of final judgment of the court, the taxpayer shall immediately pay the tax or as much of the tax as has already become due, with interest.

(2) In the event the final judgment of the court is adverse to the taxpayer, he shall pay the court costs regardless of whether the tax or any part of the tax has or has not become due at the time of the final judgment of the court.

O.C.G.A. § 50-13-12

(a) The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes, or any failure of the department to act in such a matter if the failure is deemed an act under any provision of a tax statute administered by the department, or by any order of the department in such a matter other than an order on a hearing of which the taxpayer was given actual notice of at which the taxpayer appeared as a party.

(b) Any such demand for a hearing shall be made within 30 days after the act or failure to act causing the injury and shall specify in what respect the taxpayer is aggrieved and the grounds to be relied upon as a basis for the relief to be demanded at the hearing; and, unless postponed by mutual consent, the hearing shall be held within 30 days after receipt by the Department of Revenue of the demand therefor. The proceeding shall have the status of a contested case.

(c) Pending the hearing and the decision thereof the Department of Revenue may suspend or postpone the effective date of its previous action.

(d) This Code section is not intended to require that the aggrieved taxpayer must demand a hearing hereunder

before pursuing judicial remedies which may be available to him, but an aggrieved taxpayer who does demand a hearing under this Code section shall be deemed to have elected the remedies provided in this Code section and in Code Section 50-13-19 as his exclusive remedies.

O.C.G.A. § 50-13-19

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of

the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in subsection (h) of this Code section upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief; provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this

state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

O.C.G.A. § 50-13-20

An aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law.